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No. 1109

In the Supreme Court of the United States

OCTOBER TERM, 1967

EUGENE J. MARSHALL, MARION FRANCIS FOUNTAIN AND ROOSEVELT TREMBLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Hoffa v. *United States*, 385 U.S. 293 — 5
Johns v. *United States*, 323 F. 2d 421 — 6
Katz v. *United States*, 389 U.S. 347 — 4
Long v. *United States*, No. 1001, this Term, certiorari denied, March 4, 1968 — 4
Lopez v. *United States*, 373 U.S. 427 — 5
Monroe v. *United States*, 234 F. 2d 49, certiorari denied, *sub nom. Smith* v. *United States*, 352 U.S. 872 — 6
On Lee v. *United States*, 343 U.S. 747 — 5
Rathbun v. *United States*, 355 U.S. 107 — 5
Rogers v. *United States*, 340 U.S. 367 — 8
Smith v. *United States*, 331 F. 2d 265, certiorari denied, 379 U.S. 824 — 7
United States v. *Cardillo*, 316 F. 2d 606, certiorari denied, 375 U.S. 822 — 7, 9
United States v. *Hall*, 342 F. 2d 849 — 6

Constitution and statutes:

United States Constitution:

Fourth Amendment — 5
Fifth Amendment — 7, 8
18 U.S.C. 4208(a)(2) — 2, 3
18 U.S.C. 4241 — 3

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 384 F. 2d 624.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1967. A timely petition for rehearing was denied on January 8, 1968. On February 7, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to February 14, 1968, and on February 12, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper to admit evidence of conversations overheard by the use of electronic recording devices placed on an informer's telephone and in his premises with his consent.

2. Whether the trial judge properly admitted into evidence copies of the original tape recordings of the conversations between petitioners and the informer which had been processed through a noise suppressor, and whether he properly permitted the jurors to follow the conversations with copies of an accurate transcript of the tapes.

3. Whether petitioners' convictions should be reversed because the informer invoked his privilege against self-incrimination during cross-examination.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to violate the narcotics laws and to bribe a public official. In addition petitioner Marshall, a former federal agent, was convicted on four counts of soliciting and accepting bribes, and the other petitioners were convicted, on certain of those counts, of aiding and abetting Marshall. On November 16, 1965, petitioners Fountain and Tremble were sentenced to five years' imprisonment on the conspiracy charge and to fifteen years' imprisonment on the bribery charges, the sentences to run concurrently and to be subject to the provisions of 18 U.S.C. 4208(a)(2). On April 1, 1966, petitioner Marshall was

sentenced to four years' and seven months' imprisonment on the conspiracy charge and to fourteen years' and seven months' imprisonment on each of the other counts, the sentences to run concurrently and to be subject to the provisions of 18 U.S.C. 4208(a)(2).[1]

Petitioner Marshall was the former agent-in-charge of the Miami, Florida, office of the Federal Bureau of Narcotics. Petitioners Fountain and Tremble were, respectively, a sergeant and an officer with the Miami police department assigned to narcotics enforcement (Tr. 38, 316–319, 1033).[2]

The evidence, the sufficiency of which is not challenged, showed that petitioners conspired among themselves and with one Newbold (named in the indictment as a co-conspirator) to provide "protection" for Newbold in his illicit narcotics activities. Newbold, who was the principal witness for the government, testified that beginning in late June or early July 1964 and extending into 1965 he made numerous payments totalling several thousand dollars to petitioners in accordance with their "protection" agreement. (Tr. 48–56, 62–63, 65–66, 69–83).[3]

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[1] Earlier, Marshall's sentence had been deferred and he had been committed pursuant to the provisions of 18 U.S.C. 4241 *et seq.* until certified to be mentally competent.

[2] "Tr." refers to the transcript of proceedings at trial, a copy of which is lodged with the Clerk of this Court.

[3] One Fowler also testified for the government, corroborating Newbold's evidence. Fowler came to Miami in January 1965. He arranged with Marshall to have a narcotics charge pending against him in Miami dismissed and later became a partner with Newbold, participating in the payments to petitioners (see Tr. 86–88, 517–521, 527–544).

ARGUMENT

1. On April 13, 1964, Newbold communicated with Lieutenant Gracy of the Miami police department and advised him of the illegal scheme. As a result, a monitoring device was placed on Newbold's telephone—with his permission—from April 15 to April 20, 1965 (the date of petitioners' arrest). Records of telephone calls between Newbold and petitioners obtained by the use of this device were admitted into evidence. (Tr. 137, 696–714, 838–901). In addition, an electronic listening device was placed in Newbold's apartment with his permission. Federal agents and local police officers testified, in corroboration of Newbold's testimony (Tr. 138–142), about an incriminating conversation in Newbold's apartment between Newbold and petitioners on April 20, 1965, which was overheard by means of this device. (Tr. 143, 793–799, 922–923, 977–978, 995–1000, 1020–1026).

Relying on *Katz* v. *United States*, 389 U.S. 347, petitioners contend that the evidence concerning the monitored conversations was inadmissible because the police officers did not obtain a warrant before using the electronic overhearing instruments. However, *Katz* holds only that prior judicial authorization is required when neither party has consented to the monitoring and the parties have not spoken in such a place or manner as to have exposed their words to the public ear.[4] That ruling has no application to situations such as the present, where one party to the conversation has given his consent that his conversation

[4] See the government's memorandum in *Long* v. *United States*, No. 1001, this Term, certiorari denied, March 4, 1968.

be monitored. See *Rathbun* v. *United States,* 355 U.S. 107. Where consent has been given, the situation is no different from that in which a person unwisely makes incriminating admissions to one who, unknown to him, is an informer. In such a case, the source of the criminal's undoing is not any unwarranted intrusion by the government into a right of privacy protected under the Fourth Amendment, but rather the criminal's misplaced confidence in the person to whom he has entrusted the information. See, *e.g., Hoffa* v. *United States,* 385 U.S. 293. This Court has recognized that the risk of disclosure of incriminating information, which petitioners voluntarily assumed, is not materially enlarged merely because law enforcement officers have taken precautions, with the informer's permission, to insure the accurate reproduction in court of the incriminating conversations, whether by mechanical recordation or transmittal to other listeners. *Lopez* v. *United States,* 373 U.S. 427; see *On Lee* v. *United States,* 343 U.S. 747.

2. In addition to the original tapes of the recorded conversations, the trial judge admitted into evidence copies of the tapes which had been processed through a noise suppressor to remove background noise (Tr. 834). These tapes were played for the jury, which was permitted to follow the conversations with the aid of transcripts of the tapes indicating the identity of the different speakers, which had been prepared by Lieutenant Gracy. Lieutenant Gracy testified that he had known each of the petitioners for a number of years and was readily able to identify their voices (Tr. 690, 715–716). Prior to admitting the copies and permit-

ting the jury to be furnished with the transcripts, the trial judge satisfied himself, through repeated comparisons of the transcripts and copies with the original tapes, that the copies and the transcripts were accurate reproductions of the original recordings (see Tr. 820–827). Petitioners do not challenge that finding.

In these circumstances, there is no merit to the contention that the processed copies were improperly received in evidence. Since the copies were accurate and had an obvious value in making the conversations more intelligible to the jury through the elimination of interfering noise, common sense supported their admissibility as a matter of sound judicial discretion. *Johns* v. *United States,* 323 F. 2d 421 (C.A. 5); *United States* v. *Hall,* 342 F. 2d 849 (C.A. 4); see *Monroe* v. *United States,* 234 F. 2d 49 (C.A.D.C.), certiorari denied, *sub nom. Smith* v. *United States,* 352 U.S. 872.

Nor is there merit to petitioners' argument that the decision to let the jurors utilize the transcripts unduly emphasized the importance of the conversations. As the court of appeals held, the question was one for the exercise of the trial judge's discretion after weighing that possibility against the confusion and inconvenience that would result if the playing of the tapes were to be repeatedly interrupted to permit Lieutenant Gracy to identify the respective speakers. *United States* v. *Hall, supra.* Since the jury was informed during its deliberations that the transcripts were not in evidence and had been supplied solely to enable them to follow more easily the conversations on the tapes (see Pet. App. D, 13–14, n. 9), no prejudice to petitioners resulted from the procedure.

3. (a) During Newbold's cross-examination, defense counsel elicited the fact that, following petitioners' arrests, Newbold had traveled to Kentucky, New Jersey, Canada and other places (Tr. 172–173). When Newbold was asked where he had obtained the money to finance his travels, he refused to answer. The trial judge, on being asked to rule on the refusal, inquired whether Newbold was refusing to answer on the grounds of possible self-incrimination (Tr. 176). After Newbold replied in the affirmative, defense counsel continued his cross-examination, without returning to the subject or waiting for the ruling previously sought.

In these circumstances, the court of appeals properly held that petitioners' right to cross-examine had not been impermissibly restricted. The subject of Newbold's travels following petitioners' arrests had not been raised during his direct examination. The question of his source of funds for those travels was plainly a collateral inquiry on which Newbold had the right to invoke his Fifth Amendment privilege. Thus even had defense counsel moved to strike Newbold's testimony, the trial judge would have been justified in denying the motion, since Newbold's refusal to answer did not substantially impair the ability of petitioners to test the truth of his testimony.[5] *E.g., United States* v. *Cardillo,* 316 F. 2d 606 (C.A. 2), certiorari denied, 375 U.S. 822; *Smith* v. *United States,* 331 F. 2d 265 (C.A. 8), certiorari denied, 379 U.S. 824.

[5] The question of Newbold's credibility was already before the jury, since he had admitted to three prior convictions (Tr. 51; see Tr. 177–178), in addition to his self-admitted complicity in the instant conspiracy.

(b) Newbold testified on direct examination that petitioner Fountain first approached him in the latter part of June 1964 with a request for $1000, assuring Newbold of city and state protection for his illegal activities and implying federal protection (Tr. 48–52). Several days later, Fountain telephoned Newbold and made an appointment to see him at his house. Newbold had his wife draw $800 or $900 from her bank account, and he gave $840 to Fountain, promising him an additional $160 (Tr. 54–55, 206). Evidence was later introduced reflecting a withdrawal of $800 from Mrs. Newbold's account about the time indicated (Tr. 320–325, 334).

On cross-examination of Newbold, defense counsel asked how Newbold had acquired the money with which to make the initial payment (Tr. 218). Newbold refused to answer on Fifth Amendment grounds. Defense counsel did not request a ruling by the trial judge but instead immediately continued his cross-examination with questions on unrelated matters (Tr. 219).

Petitioner contends that the trial court erred in not requiring Newbold to disclose the source of the funds with which he made the original payment. However, Newbold had not waived his privilege through previous incriminating testimony as to the matter sought to be explored, and he was, therefore, entitled to invoke the Fifth Amendment as a ground for refusal to answer. Compare *Rogers* v. *United States*, 340 U.S. 367.

Since defense counsel did not move to strike any portion of Newbold's testimony and, in fact, made no

objection to the fact that Newbold had been allowed to invoke his privilege, the situation here is not like that in *United States* v. *Cardillo,* 316 F. 2d 606, 611–613 (C.A. 2), certiorari denied, 375 U.S. 822, where the denial of a motion to strike a witness' testimony regarding the source of $5,000 with which he had made a single payment for stolen furs was held to be reversible error. In *Cardillo*, the court characterized the witness' testimony as comprising "practically the entire case" against the two defendants whose convictions were reversed. 316 F. 2d at 611. Here, on the other hand, Newbold had testified to a series of payments to petitioners, and his testimony was corroborated by his partner Fowler, who was present when some of the payments were made (see note 3, *infra*), and by the recordings of petitioners' conversations, which also showed the existence of the conspiracy. Moreover, in *Cardillo* the court pointed out that there was good reason to suspect that the witness never had the $5,000 (316 F. 2d at 612), whereas here the records of Mrs. Newbold's bank account reflected a withdrawal of $800 at about the time Newbold testified he made the $840 payment to Fountain. The court's conclusion, on these facts, that no substantial right of petitioners was infringed by Newbold's invocation of his privilege is clearly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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